IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.:

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
MINISTER OF ELECTRICITY	First Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Second Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
ESKOM HOLDINGS SOC LIMITED	Fourth Respondent
MINISTER OF PUBLIC ENTERPRISES	Fifth Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

KEVIN MILEHAM

do hereby make oath and say that:

1. I am an adult male. I am a member of Parliament. I am a member of the Democratic Alliance. I am the Shadow Minister of Mineral Resources and

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Energy. I am authorised to bring this application on behalf of the Democratic Alliance (**KM1**).

2. The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. They are, to the best of my knowledge and belief, both true and correct. Where I make submissions of law, I do so on the advice of the DA's legal representatives.

A. INTRODUCTION

3. On 26 January 2024, pursuant to section 34 of the Electricity Regulation Act 4 of 2006 (**ERA**), the Minister of Electricity issued, by way of publication in the government gazette, a determination to commence the process to procure new nuclear energy generation capacity of 2 500 MW (**the determination** or **the section 34 determination**). I attach the determination as **KM2**.

4. This is an application to review the section 34 determination.

5. The determination has significant repercussions. An additional 2 500 MW is about double South Africa's current nuclear energy generation capacity. The procurement will probably cost in the region of at least **R400 billion**, although the cost could be much higher. An energy expert has estimated, based on respected international studies, that building a 2500 MW nuclear power plant in South Africa would cost somewhere between US$21 billion (**about R400 billion**) and US$ 35 billion (**about R700 billion**) before interest and other costs (**KM3**). To put this into perspective, this will be the largest public procurement in South Africa's history. Taxpayers and electricity consumers

will shoulder this cost. The process will take more than ten years before any nuclear energy comes online, even if the construction of the new nuclear power plant is not delayed. However, experience around the world teaches that the construction of nuclear power plants is generally delayed by many years. The procurement will entail years of substantial government expenditure through contracts and subcontracts to private parties and potentially foreign states or foreign-state-controlled entities. The decision, given the nature of nuclear fuel and waste, may have severe implications for the environment.

6. This is not an application about the correctness of government's decision to procure additional nuclear energy. This is an application about the procedural fairness and lawfulness of the determination.

7. The DA submits that the determination must be reviewed and set aside for four reasons.

8. ***First***, the National Energy Regulator of South Africa (**NERSA**) decided to concur with the determination by the Minister of Energy and Mineral Resources (**Minister of Energy**) without affording the public a reasonable opportunity to make representations on the Minister's determination. NERSA considered the *substance* of the Minister's determination and the Minister's reasons and rationale for that determination without any public hearings or comments on that substance. NERSA did so *two years* after the Minister of Energy initially sought NERSA's concurrence, and after *substantial changes* in the South African energy landscape.

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9. ***Second***, the wrong Minister took the decision. At the time that NERSA's final (and unconditional) concurrence was sought by the Minister of Energy for the section 34 determination and given, and that section 34 determination was issued by gazette (and, therefore, came into effect and was formally made), it was the Minister of Electricity that was empowered to make the section 34 determination, not the Minister of Energy. Yet the Minister of Electricity decided to "issue" the Minister of Energy's determination (by gazetting the determination) as a *fait accompli*, without deciding for himself whether to make the determination. This meant that the issuing of the section 34 determination was vitiated by a material error of law and fact, as well as being ultra vires. Moreover, the result is that the Minister of Energy took the determination decision that has been gazetted (indeed, the actual section 34 determination gazetted in January 2024 is signed by the Minister of Energy), not the Minister of Electricity.

10. ***Third***, the entire process is vitiated by the failure to include or properly consider a central restriction that NERSA had imposed in the determination gazetted by the Minister of Electricity. The determination, amongst other things, determined who would be the procurer of the new nuclear build programme and its power to conduct the procurement process. But NERSA amended the Minister of Energy's draft determination by adding a requirement that the procurement for the additional nuclear energy must be on an Engineering Procurement and Construction Contract (**EPC**), rather than through fragmented contracts (which I refer to as **the EPC procurement restriction**). NERSA expressly imposed the EPC procurement restriction to guard against corruption and delays in the procurement process. But the

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Minister of Electricity failed to include this requirement in the gazetted determination that he issued.

11. ***Fourth***, NERSA required the Minister of Energy to conduct a demand analysis before NERSA would concur in his determination. This makes sense and was an express suspensive condition placed by NERSA on its willingness to concur. The Minister of Energy should consider how much electricity South Africa needs over the next decade before embarking on the procurement of nuclear energy that will, at best, materialise in about ten years. The Minister, on all available public information, failed to do so. Nonetheless, NERSA and the Minister decided that South Africa should procure 2 500 MW without first checking how much electricity South Africa will need over the next ten years.

12. Each of these four reasons suffice to set aside the determination. The DA reserves its right under rule 53(4) to supplement these grounds of review once it receives the records of the Minister of Electricity, the Minister of Energy, and NERSA in relation to the determination. The DA has indicated in its Notice of Motion the documents, given the facts set out below, that it expects, at minimum, to be contained in those records.

13. This affidavit addresses the following:

    13.1. **PART B:** The parties.

    13.2. **PART C:** The background.

    13.3. **PART D:** The grounds of review.

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13.4. **PART E:** Remedy and costs.

13.5. **PART F:** The need for this matter to be determined on an expedited basis.

B. THE PARTIES

14. The applicant is the DA, a registered political party, and the largest opposition party in Parliament. The DA brings this application in the public interest, in the interests of its own members, and in its own interests. The DA seeks to vindicate the rule of law in this application and ensure that government decisions comply with the prescripts of the principle of legality and section 33 of the Constitution of the Republic of South Africa, 1996.

15. The first respondent is the Minister of Electricity. On 6 March 2023, in response to the ongoing energy crisis, the President of the Republic of South Africa decided to create the office of the Minister of Electricity. On 26 May 2023, the President decided to delegate to the Minister of Electricity the powers under section 34 of the ERA, which include the powers to determine new generation capacity. On 26 January 2024, the Minister of Electricity decided to "issue" (by way of publication in the gazette) the Minister of Energy's determination under section 34 for the procurement of additional nuclear energy.

16. The second respondent is the Minister of Energy. Until 26 May 2023, the Minister of Energy was responsible for determining whether to procure additional energy generation under section 34 of the ERA. The Minister

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purported to make the determination impugned in this application. The determination, moreover, provides that the Minister of Energy's department, the Department of Mineral Resources and Energy (**DMRE**), will, in the first place, be the procurer of the new nuclear power.

17. The third respondent is NERSA. NERSA is established in terms of section 3 of the National Energy Regulatory Act 40 of 2004 (**NERA**). Section 4 of the ERA provides that NERSA is "the custodian and enforcer of the regulatory framework provided for in" the ERA. Section 34 of the ERA requires NERSA to concur in a determination to procure additional energy generation capacity. On 30 August 2023, NERSA concurred with the determination impugned in this application (after initially taking a decision in 2021 to suspend its concurrence so that the Minister could provide evidence that South Africa required and could afford 2500 MW of new nuclear energy). However, as discussed below, the determination (as gazetted) issued by the Minister of Electricity does not, in fact, reflect the determination as concurred in by NERSA (it fails to include the EPC procurement restriction).

18. The fourth respondent is Eskom Holdings SOC Limited (**Eskom**). Eskom is the state-owned company responsible for the generation, transmission, and distribution of electricity in South Africa. The determination provides, in the first place, that Eskom will generate and buy the procured 2 500MW of nuclear power. The DA does not seek any relief against Eskom, but cites Eskom for any interest it may have in this application.

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19. The fifth respondent is the Minister of Public Enterprises. The Minister oversees all state-owned companies (**SOCs**) in South Africa. The determination provides that:

19.1. in the alternative to Eskom, "any other organ of state" (and possibly "in partnership with any other juristic person") will generate the electricity from the additional 2 500MW of nuclear generation capacity;

19.2. in the alternative to Eskom, "any entity determined through the Esko[m] unbundling process as the future buyer of electricity" will buy the electricity generated by the 2 500MW of new nuclear generation capacity; and

19.3. in the alternative to the DMRE, "any other organ of state" (and possibly "in partnership with any other juristic person") will be the procurer of the 2 500MW new nuclear build programme.

20. These unnamed other organs of state (in particular, any entity unbundled from Eskom) may well be SOCs. The DA seeks no relief against the Minister of Public Enterprises but cites him for any interest he may have in this application by virtue of his oversight of SOCs.

21. The sixth respondent is the President of the Republic of South Africa. The DA seeks no relief against the President, but it cites the President as a respondent for two reasons.

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21.1. First, the Minister of Electricity does not have his own department but exists within the Office of the Presidency.

21.2. Second, as the head of the national executive, the President oversees national government and, in turn, almost all organs of state. The determination provides, in the alternative, that "any organ of state" may generate or procure the 2 500MW nuclear build programme. So, the DA cites the President for any interest he may have in this matter by virtue of his oversight of the national executive and various organs of state.

C. THE BACKGROUND

22. There are three aspects to this application's background:

22.1. The statutory context.

22.2. The events leading up to *Earthlife Africa v Minister of Energy* 2017 (5) SA 227 (WCC) (***Earthlife***).

22.3. The events after *Earthlife*, leading up to this application.

(i) <u>The statutory context</u>

23. Who determines how much electricity can be generated in South Africa, and the sources of that electricity?

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24. In an entirely unregulated, open market, the supply and sources of electricity would be determined primarily by demand, technological advancements, and competition.

25. However, the ERA provides that the *state* decides on South Africa's generation capacity, and the sources of South Africa's energy. Section 34(1) reads:

> *"The Minister may, in consultation with [NERSA]—*
>
> *(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;*
>
> *(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;*
>
> *(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;*
>
> *(d) determine that electricity thus produced must be purchased by the persons set out in such notice;*
>
> *(e) require that new generation capacity must—*
>
> *(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost effective;*
>
> *(ii) provide for private sector participation."*

26. Section 34(2) provides the Minister (in this case, the Minister of Electricity, for reasons given below) with wide-ranging powers to achieve the ends of section 34(1). For example, the Minister may enter contracts, organise tenders, and incur obligations on behalf of the state.

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27. Section 34(3) provides that NERSA is *bound* by any determination made under section 34(1). The primary impact of this "bind" is on licencing. NERSA decides who generates electricity in South Africa by issuing licences; no one can generate electricity in South Africa without a licence. NERSA could not issue a licence to generate electricity contrary to a section 34 determination. For instance, if a section 34 determination said that South Africa is limited to 10GW of electricity, and all that electricity must come from coal, NERSA could not licence the generation of 12GW of electricity from solar panels.

28. The Minister may only make a determination under section 34(1) "in consultation with" NERSA. This means that NERSA must concur in the Minister's determination for the determination to be valid and final. In other words, a valid and final section 34 determination requires NERSA and the Minister to reach agreement on all of its terms.

29. NERSA's concurrence with a section 34 determination must comply with the requirements of NERA. NERA regulates NERSA's powers and duties generally. For example, it provides for NERSA's composition, personnel, and funding. Section 9 of NERA provides that NERSA's members must exercise their discretion justifiably and transparently, act independently without any undue influence or instructions, and act in the public interest.

30. The most important section in NERA for this application is section 10. Section 10 reads in relevant part:

> *"(1) Every decision of the Energy Regulator must be in writing and be—*

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(a) consistent with the Constitution and all applicable laws;

(b) in the public interest;

(c) within the powers of the Energy Regulator, as set out in this Act, the Electricity Act, the Gas Act and the Petroleum Pipelines Act;

(d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;

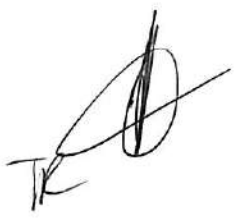
(e) based on reasons, facts and evidence that must be summarised and recorded; and

(f) explained clearly as to its factual and legal basis and the reasons therefor.

(2) Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(3) Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)."

31. NERSA's "every" decision must be procedurally fair. NERSA regularly undertakes public consultation processes, from when NERSA decides on electricity tariff prices to when NERSA decides to issue licences. Furthermore, every time NERSA takes a decision, NERSA must communicate its decision, including a summary of the reasons, facts and evidence underpinning the decision, and an explanation for the factual and legal basis for the decision.



32. When NERSA decides to concur in a section 34 decision, NERSA's decision must also be procedurally fair and communicated in accordance with section 10.

33. Section 34 must be read with section 2 of ERA, which lists the ERA's objects:

> *"The objects of this Act are to—*
>
> *(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*
>
> *(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;*
>
> *(c) facilitate investment in the electricity supply industry;*
>
> *(d) facilitate universal access to electricity;*
>
> *(e) promote the use of diverse energy sources and energy efficiency;*
>
> *(f) promote competitiveness and customer and end user choice; and*
>
> *(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public."*

34. NERSA must aim to achieve the objectives set out in section 2 when it decides where or not to concur in a section 34 determination.

(ii) <u>The facts leading up to *Earthlife*</u>

35. This is not the first application to review a section 34 determination to procure nuclear energy.

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36. On 17 December 2013, the then Minister of Energy, with NERSA's concurrence, purported to determine that South Africa required 9 600 MW of new nuclear power. He did not gazette his decision.

37. On 10 June 2015, the Minister of Energy tabled intergovernmental agreements (**IGA**) before Parliament—all concerning the procurement of nuclear energy. The IGAs were with the United States of America, the Republic of Korea, and the Russian Federation.

38. In October 2015, Earthlife and the Southern African Faith Communities Environmental Institute (**SAFCEI**) instituted proceedings before the High Court, Western Cape Division, Cape Town to review the decisions to enter, to table, and to authorise the IGAs.

39. On 21 December 2015, in response to Earthlife and SAFCEI's application, the Minister gazetted his section 34 determination (dated 17 December 2013). He provided this gazetted determination as part of the rule 53 record on 23 December 2015. This was the first time Earthlife and SAFCEI, and the public, had seen his determination. Earthlife and SAFCEI amended their relief to review the determination, including all requests for information or proposals flowing from the determination.

40. On 8 December 2016, while the *Earthlife* application was before the High Court, the Minister gazetted another section 34 determination. The determination was still that South Africa required 9 600MW of nuclear power. The difference was that in this determination, the Minister decided that Eskom

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would procure the nuclear power plants (not the Department of Energy). NERSA concurred in this determination.

41. Earthlife and SAFCEI had to amend their relief further, this time impugning the second section 34 determination too (and all related requests for information or proposals).

42. On 26 April 2017, the High Court handed down its judgment in *Earthlife*. It set aside both section 34 determinations. (It also set aside the government's tabling of the IGAs under the wrong section of the Constitution, which would have allowed the IGAs to be made binding absent parliamentary approval). Its reasoning, in relevant part, was that:

42.1. Section 34 governs all decisions concerning the requirement of new electricity generation capacity (para 24).

42.2. A section 34 determination is of no force and effect unless and until NERSA agrees with it (para 24).

42.3. A section 34 determination constitutes administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) (paras 32 and 40). NERSA's decision to concur in a section 34 determination constitutes administrative action (para 37).

42.4. NERSA must comply with section 10 of NERA when concurring in a section 34 determination, including providing affected persons with

an opportunity to submit their views and present relevant facts and evidence to NERSA (paras 36 and 41).

42.5. If NERSA's concurrence in a section 34 determination is procedurally unfair or unlawful, then the section 34 determination would be invalid (para 40).

42.6. In both the 2013 and 2016 section 34 determinations, NERSA failed to permit and consider *any* public input. NERSA acceded to the Minister's determinations in a matter of days (para 43). The determined nuclear procurement came with significant cost, scale, and impact. In the case of the 2016 determination, two years had passed since NERSA's prior concurrence (para 67). NERSA's decisions, accordingly, required public consultation (para 44).

42.7. Alternatively, even if NERSA's decision was not administrative action, rationality required NERSA to consult "sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power" (para 50).

42.8. The 2013 determination was also unlawful because it had not been gazetted for over two years. The delay in gazetting the determination implied that NERSA needed to provide its concurrence afresh before the determination could be gazetted, which further entailed a fresh public participation process (para 57). Factual developments may have afforded NERSA reason to withhold its consent, and contrary

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reasons may have emerged from members of the public whose views developed in the interceding years (para 57).

43. As I explain below, when addressing grounds of review, *Earthlife* is on all fours with this matter.

(iii) The events leading to this application

44. The *Earthlife* order sent the Minister of Energy and NERSA back to Begin. They needed to restart the process leading to a section 34 determination. In 2019, two years after *Earthlife*, the Minister of Energy re-commenced the process that led to his determination of 26 January 2024.

45. The events leading to this application occurred in seven steps.

45.1. First, the Minister of Energy promulgated an updated Integrated Resource Plan (**IRP**).

45.2. Second, after a request for information (**RFI**), the Minister sent a draft section 34 determination to NERSA.

45.3. Third, NERSA invited public comments on this draft section 34 determination.

45.4. Fourth, NERSA decided to (a) suspend its concurrence in the section 34 determination and (b) require the Minister's determination to include a limitation on the power of the procurer of the new nuclear capacity to ensure that the procurements were not tainted by

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corruption – it added the EPC procurement restriction. NERSA suspended its concurrence pending the satisfaction of *substantive* conditions by the Minister of Energy. These conditions included demonstrating the "rationality" of the determination and the cost, pacing, and need for additional nuclear generation capacity.

45.5. Fifth, nothing seemed to happen for *two years*, during which NERSA and the Minister refused to engage with the public about whether and how the Minister would be able to satisfy NERSA's substantive conditions.

45.6. Sixth, after *two years*, without any public consultation, without any written reasons, and apparently after considering a secret report by the Minister of Energy, NERSA decided to concur unconditionally with the Minister's determination. The Minister of Electricity then "issued" the Minister of Energy's determination (although, as discussed below, this appeared to be based on the mistaken belief that NERSA had unconditionally concurred with the Minister's proposed section 34 determination in 2021).

45.7. Seventh, the DA applied to access the Minister of Energy's report and other records before NERSA; but NERSA and the DMRE refused the DA access.

(a) *The IRP*

46. An IRP plays an important role under the ERA.

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46.1. Section 1 of the ERA defines an IRP as "a resource plan established by the national sphere of government to give effect to national policy".

46.2. Section 4(a)(iv) of ERA obliges NERSA to issue rules designed to implement the IRP.

46.3. Section 10(2)(g) obliges applicants for licences to demonstrate compliance with the IRP or reasons for deviation from the IRP for the approval of the Minister.

46.4. However, the ERA, signally, does not provide for the IRP to be considered, let alone considered binding, when making section 34 determinations. Section 34, makes no reference to the IRP. It is a policy document or plan that fulfils a defined and limited legislative purpose under the ERA – and no more. It is not legislation and cannot bind the discretionary power vested in the Minister and NERSA by section 34.

47. Regulation 4 of the Electricity Regulations on New Generation Capacity published under GN R399 in *GG* 34262 of 4 May 2011 provides that the Minister will develop and gazette the IRP after consultation with NERSA. NERSA is obliged to assist the Minister in developing and monitoring the IRP's implementation.

48. On 6 May 2011, the then Minister of Energy first promulgated an IRP (Electricity Regulations on the Integrated Resource Plan 2010-2030 published under GN R400 in *GG* 34263). I will refer to this as the **IRP2010**. The

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IRP2010 was meant to be updated regularly, but it was not. The IRP2010 considers only the period 2010 to 2030.

49. On 18 October 2019, eight years after the IRP2010, the Minister of Energy promulgated an updated IRP (published under GN 1360 in *GG* 42784). I refer to this as the **IRP2019**. I attach it as **KM4**.

50. The IRP2019 explains in its introduction the purpose and nature of an IRP.

50.1. An IRP is an electricity infrastructure development plan based on least-cost electricity supply and demand balance, considering security of supply and the environment.

50.2. An IRP's objectives include affordable electricity, reduced greenhouse gas emissions, reduced water consumption, diversified electricity generation sources, localisation, and regional development.

50.3. The IRP2019 addresses the electricity element of the National Development Plan (**NDP**). The NDP is government's long term policy addressing South Africa's development, reduction of inequality and unemployment, and the attainment of a decent standard of living.

50.4. The IRP is an evolving plan sensitive to "very fast changes" in energy technologies. Therefore, it is envisaged that, as a "living plan", each iteration of the IRP would be "revised regularly".

50.5. The IRP2019 warns of the uncertainty in the energy sector:

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"As we plan for the next decade, this technological uncertainty is expected to continue and this calls **for caution as we make assumptions and commitment for the future in a rapidly changing environment**. Accordingly, **long-range commitments are to be avoided as much as possible, to eliminate the risk that they might prove costly and ill-advised.**" (emphasis added).

50.6. The IRP2019 provides that energy generation capacity must "be paced to restore the necessary reserve margin and to be ahead of the economic growth curve **at least possible cost**". (emphasis added)

50.7. The IRP2019 commits to a diverse energy mix in South Africa. With respect to nuclear power, the IRP2019 explains that nuclear power "should be done at a scale and pace that flexibly responds to the economy and associated electricity demand, in a manner that avoids tariff shocks in particular; it is the user of electricity that ultimately pays". The IRP2019 acknowledges the "**>10 year lead time**" for nuclear power.

50.8. Like IRP2010, IRP2019 does not consider or address energy infrastructure, demand, or supply after 2030.

51. The IRP2019 explains that the IRP2010's predictions for electricity demand did not materialise.

51.1. "[A] number of assumptions have changed since the promulgation of [the IRP2010]. Key assumptions that changed include

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the electricity demand projection, Eskom's existing plant performance, as well as new technology costs".

51.2. The IRP2019 records that due to load-shedding, "most residential estates, commercial parks and shopping centres have installed PV systems to supplement grid supply". The IRP2019 predicts that most users will migrate away from the electricity grid. (I note, as an aside, that this prediction has not only proved to be correct but has very significantly increased in the years since the IRP2019 was gazetted).

51.3. There is lower demand for government-supplied electricity in South Africa than predicted in 2011 due to low economic growth; improved energy efficiency by large consumers; fuel switching to liquefied petroleum gas for cooking and heating; fuel switching for hot water heating by households, including PV installation; and the closing down or relocation to other countries of some of the energy intensive industry (para 4.1).

51.4. The IRP2019 explains that instead of government-supplied electricity demand growing by an average of 3%, as predicted by the IRP2010, demand declined at an average compound rate of -0.6%. In 2016, for example, demand for government electricity was 18% less than predicted.

52. The IRP2019 records that post 2030, 24 100MW of electricity from coal generation will be decommissioned due to coal plants' end of life (para 5.3.6).

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53. The IRP2019 acknowledges that "there is an immediate risk of huge power shortages" given Eskom's poor performance, decommissioned power plants, and early shutdown of non-performing units. At the same time, the IRP2019 accepts the bleak reality that "implementation lead times for various generation technologies limit the options available for deployment immediately and in the short term" (para 5.1).

54. The IRP2019 considering these factors and others, then lists numerous "decisions". These decisions constitute government's plan to address South Africa's energy infrastructure. For example, Decision 1 is to procure capacity to supplement Eskom's declining plant performance and to reduce reliance on diesel generators in the immediate term.

55. Decision 8 concerns nuclear power. It reads:

> *"Commence preparations for a nuclear build programme to the extent of 2 500 MW at a pace and scale that the country can afford because it is a no-regret option in the long term".*

56. The IRP2019 explains the rationale behind this decision at para 5.3.6:

> "Taking into account the existing human resource capacity, skills, technology and the economic potential that nuclear holds, **consideration** must be given to **preparatory work** commencing on the **development** of a clear road map for a **future** expansion programme. This IRP proposes that the nuclear power programme must be implemented at an **affordable pace and modular scale** (as opposed to a fleet approach) and taking into account technological developments in the nuclear space.
>
> Taking into account the capacity from coal to be decommissioned post 2030 and the end of design life of Koeberg nuclear power plant,

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> additional nuclear capacity **at a pace and scale the country can afford** is a no regret option." (emphasis added)

57. Decision 8 is certainly not a commitment to procure 2 500MW of nuclear energy by 2030. Decision 8 is at best a policy commitment to beginning the process of developing a plan for the procurement of nuclear energy—up to 2 500MW.

58. Hence, for example, in Table 5 at para 5.2, which summarises the additional capacity to which IRP2019 commits, there is no green cell indicating an additional 2 500MW of nuclear energy. Similarly, para 5.3.10, which tabulates steps mitigating risks associated with nuclear power, provides that Koeberg's life will be extended. There is no mention of a further acquisition of nuclear energy.

59. The IRP2019, acutely aware of the extreme costs of nuclear power, emphasises that any nuclear energy plan must ensure the procurement of nuclear energy at a pace and scale South Africa can afford.

60. As we explain below, the Minister of Energy leans heavily on Decision 8 in his section 34 determination. The Minister's section 34 determination which he sought concurrence in, specifically references Decision 8. NERSA was concerned that the Minister, in fact, did not comply with Decision 8 when NERSA suspended its concurrence in the section 34 determination.

61. In any event, it is important to emphasise that the IRP does not fetter NERSA's or the Minister's power and discretion under section 34. The final lawful

exercise of power and decision to procure new generation capacity is the sole preserve of NERSA and the Minister of Electricity under section 34. This power must be exercised lawfully, procedurally fairly, and rationally.

62. Finally, it should be noted that the IRP2019 was developed a half-decade before the section 34 determination was issued on 26 January 2024. In fact, by the time the Minister of Electricity decided to gazette the section 34 determination, a new draft IRP2023 had already been gazetted for public comment on 4 January 2024.

(b) *The draft section 34 determination*

63. On 7 May 2020, during a presentation to the National Assembly's Portfolio Committee on Mineral Resources and Energy, the Minister of Energy indicated that his department will soon commence a procurement process for 2 500MW of nuclear energy, as envisaged in the IRP2019 (**KM5**).

64. I note immediately, as just explained above, that the IRP2019 does not envisage the procurement of 2 500MW of nuclear generation capacity. IRP2019 envisages preliminary steps being taken to develop a plan to procure *up to* 2 500MW of nuclear capacity at a pace and scale that the country can afford. Moreover, as emphasised, the IRP2019 is a policy document; it cannot authorise the procurement of new nuclear generation capacity, which requires a separate, lawful determination by NERSA and the Minister of Electricity of the need to procure new energy capacity under section 34, after a process of public consultation. Neither the Minister nor NERSA are bound by the IRP when exercising their powers under section 34.

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65. On 15 June 2020, the Minister of Energy issued a request for information (**RFI**) in respect of a new nuclear build programme (**KM6**). The RFI was "issued solely for information and planning purposes and does not constitute a solicitation of bid". The RFI sought market information and technical details on nuclear power plant technologies, including technologies currently under development but which will be ready for commercialisation by 2030 (para 3.6). The RFI requested the costing and financing of plant technologies as matters of "great importance" (para 4.1).

66. The closing date for the RFI was two weeks later—30 June 2020 (para 6.1.2).

67. The DA has not seen the responses to the RFI, if any, received by the Minister.

68. On 6 August 2020, about six weeks after the RFI's closing date, the Minister of Energy sent to NERSA a draft determination in terms of section 34 of the ERA. The draft is annexed **KM7**. The draft is identical to the final (gazetted) determination. The draft, like its ultimate version, determines to procure 2 500MW of nuclear generation capacity, as well as determining the generator and buyer of the electricity produced by that new nuclear capacity and the procurer of that new nuclear capacity ("the nuclear new build programme"). It reads:

> *"The Minister, in consultation with the National Energy Regulator of South Africa ("NERSA"), acting under section 34(1) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) (as amended) (the ERA) has determined as follows:*
>
> *1. To commence the process to procure the new nuclear energy generation capacity of 2 500 MW as per decision 8 of the Integrated Resource Plan for Electricity 2019 - 2030 (published*

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as GN 1360 of 18 October 2019 in Government Gazette No. 42784)("IRP 2019");

2. *The generator of this electricity produced will be either Eskom Holdings (SOC) Limited, or any other organ of state, or in partnership with any other juristic person.*

3. *The buyer of the electricity will be Eskom Holdings (SOC) Limited or any entity determined through the Eskom's unbundling process as the future buyer of electricity.*

4. *The procurer of the nuclear new build programme will be the Department of Mineral Resources and Energy, or any other organ of state, or in partnership with any other juristic person.*

5. *The procurer designated above will be responsible for determining the procurement process which will be established through a tendering procedure which is fair, equitable, transparent, competitive and cost effective."*

69. The reference to Decision 8 of the IRP2019 is the same Decision 8 discussed above. Again, I underscore how, while Decision 8 appears to be given as the predicate for the determination ("as per Decision 8"), Decision 8 does not envisage the procurement of 2 500MW, but only steps towards developing a plan to procure up to 2 500MW.

70. On 23 November 2020, NERSA published a consultation paper requesting stakeholders to submit written comments on the Minister's draft section 34 determination. The closing date for submissions was 5 February 2021.

71. When inviting public comments, NERSA published only:

71.1. An invitation to comment (**KM8**).

71.2. The consultation paper (**KM9**).

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71.3. The Minister's draft section 34 determination (KM7).

72. The public apparently received no further documents. It is thus unclear whether the Minister presented any further documents to NERSA when he submitted his draft section 34 determination for NERSA's concurrence.

(c) *The process before NERSA*

73. In its consultation paper, NERSA, correctly, acknowledges that NERSA must satisfy the requirements of PAJA and section 10 of NERA before deciding whether to concur in the Minister's determination.

74. The consultation paper asks stakeholders numerous questions addressing the substance of whether NERSA should concur in the determination. The consultation paper also asks stakeholders numerous questions addressing the substance of whether NERSA should concur in the determination. These questions include:

> *"Is this 2 500MW of nuclear capacity section 34 determination compliant with the IRP 2019 as gazetted by the Minister of Mineral Resources and Energy?*
>
> *Considering the lead time [of circa 10 years], what would be the most suitable time to commence preparations if nuclear was to be a no-regret option to replace the base load capacity to be decommissioned post 2030?*
>
> *Comment on the impact of nuclear technology on the electricity tariff and how this may affect demand for electricity in the longer term, and how this may affect future investment decisions and how long the investment cycle is, where applicable.*
>
> *Comment on the costs of mature and commercially available nuclear power generation technologies [. . .] Comments on costs should*

incorporate overall cost of the technology and must not be limited to overnight cost.

Comment on the most suitable pace (timing between power units) at which South Africa should implement the nuclear build programme.

Comment on the socio-economic impact of nuclear new build programme on South Africa (e.g. job opportunities and localisation)."

75. These questions are important—they go to the heart of whether NERSA should concur with the determination. As I explain below, NERSA did not answer these questions at the end of this public participation process.

76. On 23 and 24 February 2021, NERSA conducted virtual public hearings on the draft determination.

77. According to the RFD, NERSA received 304 comments from individual stakeholders. Out of the 304 individual stakeholder comments, "235 comments were opposed to NERSA concurring with the ministerial determination, 59 were supportive and 10 were on the fence" (RFD para 3.1.6).

78. The DA has not seen all these comments.

(d) *NERSA's suspended concurrence*

79. On 27 August 2021, the Minister of Energy issued a media statement welcoming NERSA's concurrence of 26 August 2021 with his draft section 34 determination. The Minister undertook to embark on the procurement of

2 500MW of nuclear energy capacity, and to issue a request for proposal (**RFP**) by the end of the 2021/22 financial year (**KM10**).

80. The Minister appeared to have shot the gun. On 3 September 2021, NERSA corrected the Minister's media statement in its own announcement (**KM11**). NERSA announced that on 26 August 2021 it decided to suspend any concurrence with the Minister's section 34 determination pending the Minister satisfying certain conditions.

81. NERSA decided to concur—

> "with the commencement of the process to procure the new nuclear energy generation capacity of 2 500MW as per Decision 8 of the Integrated Resource Plan for Electricity 2019 – 2030 (published as GN 1360 of 18 October 2019 in Government Gazette No. 42784) ('IRP 2019') **subject to the following suspensive conditions**:
>
> 1.1 Satisfaction of Decision 8 of the IRP 2019, which requires that the nuclear build programme must be at an affordable pace and modular scale that the country can afford because it is no regret option in the long term
>
> 1.2 Recognition and taking into account technological developments in the nuclear space
>
> 1.3 To further establish rationality behind the 2 500MW capacity of nuclear. A demand analysis aimed at matching the envisaged load profile post 2030, with the generation profile that would be needed to match that load profile, is required. This will assist to determine the capacity and the scale at which the country would need to procure nuclear." (emphasis added)

82. NERSA further decided that while it was willing to concur with the Minister that (as per para 5 of the draft determination – see paragraph 68) the procurer was given the responsibility to determine the "procurement process", it required the

Minister's determination to be amended to make the power given to the procurer subject to "the new nuclear power being procured based on the Engineering Procurement and Construction (EPC) contract principles rather than through fragmented contracts". As can be seen in the media statement setting out NERSA's decision: NERSA amended paragraph 5 of the draft determination from the Minister to require that it read (NERSA's addition in bold):

"The procurer designated above will be responsible for determining the procurement process, which will be established through a tendering procedure that is fair, equitable, transparent, competitive and cost-effective, **subject to**

5.1 the new nuclear power being procured on an Engineering Procurement and Construction (EPC) contract rather than through fragmented contracts." (emphasis added)

83. This limitation – which I refer to as the EPC procurement restriction – on the procurer was intended to and was an ongoing requirement (or limitation). It limited the power of the procurer when determining the procurement process. Plainly, it was intended to and should have been included in the final gazetted determination. It was a material variation to the determination, that NERSA required to be made, and would place an ongoing limitation on the powers of the procurer. Importantly, if one compares paragraph 1 (where NERSA lists its three "suspensive conditions") with paragraph 5 (where NERSA adds the EPC procurement restriction (the ability to procure would be 'subject to"), plainly, the EPC procurement restriction added in paragraph 5 is an ongoing requirement (unlike the conditions in paragraph 1, it is not styled as a

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"suspensive condition"). It is an ongoing change or qualification to the determination. The Minister was required to accept this amendment to the determination if he wished to finalise the determination and gazette it. The Minister, unlawfully, failed to do this – as I will discuss below.

84. On 18 November 2021, NERSA published the reasons for its decision to suspend its concurrence (**KM12**). I will refer to this document as the **RFD**.

85. The RFD recorded again NERSA's decision of 26 August 2021, before providing its reasons. The recordal of the decision remains substantively the same as the recordal in its 3 September 2021 media statement (KM11). However, a slight change has been made in the way it sets out the "suspensive conditions," although this does not affect the content of the conditions. NERSA now recorded the suspensive conditions as follows:

> "1.1. Satisfaction of Decision 8 of the IRP 2019 which requires that the nuclear build programme must be at an affordable pace and modular scale that the country can afford because it is no regret option in the long term. **This will require the following to be satisfied:**
>
> 1.1.1 Recognition and taking into account technological developments in the nuclear space.
>
> 1.1.2 To further establish rationality behind the 2 500MW capacity of nuclear, a demand analysis aimed at determining the envisaged load profile post 2030, to derive the generation mix that would be needed to meet the envisaged demand. This will assist to determine the capacity and the scale at which the country would need to procure additional power generation from various technologies, including nuclear." (addition in bold; compare to KM11 (quoted in paragraphs 81 above)

86. The RFD records, as did NERSA's media statement, that NERSA suspended its concurrence to the procurement of 2 500MW of nuclear generation capacity subject to three conditions (or put differently, made its decision to concur

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conditional on the fulfilment of three substantive conditions listed in paragraph 1).

87. *Condition One*: NERSA required the Minister to satisfy NERSA that the Minister's proposed 2 500MW nuclear build programme was at an affordable pace and modular scale that the country can afford, as envisaged in Decision 8 of the IRP2019.

88. *Condition Two*: NERSA required the Minister to recognise and consider technological developments in the nuclear energy sector.

89. *Condition Three*: NERSA required a demand analysis from the Minister as a precondition to any future decision's "rationality". The condition reads:

> *"To further establish rationality behind the 2 500MW capacity of nuclear, a demand analysis aimed at determining the envisaged load profile post 2030, to derive the generation mix that would be needed to meet the envisaged demand. This will assist to determine the capacity and the scale at which the country would need to procure additional power generation from various technologies, including nuclear."*

90. In the recordal of the decision in the RFD, NERSA would appear to suggest (by its slight alteration) that conditions two and three would, to some extent, function as sub-conditions of condition one (the primary condition). In other words:

90.1. NERSA wanted the Minister to satisfy it that South Africa in fact ***required*** and could ***afford*** 2 500 MW of new nuclear power, and to do so, inter alia:

90.2. By properly taking account of **technological developments** in the nuclear field; and

90.3. By doing a **demand analysis** to establish that procuring 2500MW of new nuclear energy was in fact **"rational"**, which demand analysis determined "the envisaged **load profile** post 2030" and derived "**the generation mix that would be needed** to meet the envisaged demand", and "assisted to determine **the capacity and the scale at which the country would need to procure** additional power generation from various technologies, including nuclear".

91. NERSA further required, as explained above, that the new nuclear power be procured on an EPC rather than through fragmented contracts. This is not a condition suspending NERSA's concurrence. This is a condition *of* NERSA's concurrence (in other words, a modification of the determination, demanded by NERSA), assuming the Minister meets the three suspensive conditions. So NERSA required paragraph 5 of the determination to be amended to add a limitation on the power of the procurer (the EPC procurement restriction). Its agreement with the determination was predicated on this amendment being made to the Minister's draft section 34 determination. This was intended as a necessary (and ongoing) requirement to prevent a nuclear plant from becoming a "white elephant" (para 8.3.5). This is why, in its decision, it does not state that this is a "suspensive condition". And, in any event, however characterised by NERSA, the EPC procurement restriction is evidently an ongoing limitation on the procurer's exercise of procurement power when

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procuring nuclear power. It, therefore, had to be included in the gazetted section 34 determination.

92. The RFD sets out why NERSA decided to suspend its concurrence to the Minister's determination.

93. With respect to *Condition One*, NERSA was concerned that the lack of clarity from the Minister on the proposed timing and scale of the nuclear build compromised NERSA's ability to perform a proper analysis of tariff impacts, affordability, orderly development of the industry, and the customer interests (para 9.3.1).

93.1. NERSA was concerned, given the high cost of nuclear power and state-owned enterprises' poor track record in project management, that nuclear power would be far too costly (para 9.4.1).

93.2. NERSA had insufficient information from the Minister on costing. NERSA had to estimate the costs of nuclear power off a dated 2013 study (para 6.2.1), and by "postulating and utilising abstract information" (para 6.3.2).

93.3. So, NERSA required the Minister to satisfy NERSA that his plan would be at an affordable pace and modular scale.

94. As for *Condition Two*, NERSA was concerned that the Minister's decision was unreasonable (para 9.6.6-8). NERSA appeared concerned that the Minister had not leveraged or considered the technological advancements in nuclear energy generation in drafting his section 34 determination. NERSA thus

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required the Minister to consider technological advancements, including small modular reactors (**SMRs**).

95. NERSA imposed *Condition Three* because the Minister failed to provide NERSA with a demand analysis that considers demand beyond 2030. The RFD explains:

95.1. Beyond 2030, NERSA predicts that there will be a gap of 25.7GW between the baseload demand (38.5GW) and baseload supply (12.8GW) (para 5.2.6).

95.2. Baseload refers to the constant, non-variable energy consumed on a continuous basis (para 5.1.1). For example, industrial smelters that operate 24 hours a day form part of the baseload demand.

95.3. The gap between demand and supply is due primarily to the decommissioning of 24.1GW of electricity generated through coal.

95.4. In other words, on NERSA's estimates, there will not be enough electricity baseload capacity to address constant demand after 2030 by some 25GW.

95.5. NERSA's concern appears to be the disjunct between the Minister's determination and the projected demand, and whether it would adequately address the predicted shortfall in supply.

95.6. The Minister, it appears, never considered how demand for electricity may look post-2030, when nuclear energy generation comes online.

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The IRP2019 does not consider demand post-2030. NERSA, it seems, was never provided with data showing how, and to what extent, the nuclear build program would address electricity demands after 2030.

95.7. NERSA sought to fill the gap, by requiring the Minister to conduct a demand analysis to determine the envisaged load profile post 2030 (para 8.2.6). NERSA required a demand analysis "to confirm whether the country will have enough capacity post 2030 with or without the proposed nuclear power plant or whether this capacity shortage can be met by alternative sources" (para 8.3.6).

96. Annexure C to the RFD is an undated and unsigned "Geopolitical Study". It appears NERSA conducted this study or commissioned a third party to do so. The Geopolitical Study, after considering numerous foreign jurisdictions' approaches to nuclear energy, makes the following recommendations (p. 85):

> "It is recommended that NERSA obtains the full picture of the cost of the nuclear option and not just the [Levelised Cost of Electricity].[1] The full costs including future cost of decommissioning nuclear power plants and nuclear waste handling costs should be determined. The total cost should be broken down and it should be clear what it would cost the country compared to other base load generator options such as clean coal.
>
> It is also recommended that a detailed study should be conducted which will compare the option of adding clean base load generation once coal is decommissioned as opposed to adding more [variable renewable energy] at the additional cost of ancillary services. This should be done in order to determine the approximate base load required and the

[1] LCOE calculates the present value of the total cost of building and operating a power plant over an assumed lifetime (para 6.2.2). It *excludes* the cost of financing construction projects.

> ancillary services needed in order to maintain grid stability. The associated costs should also be indicated in the study.
>
> Finally, it is recommended that preparations should be made for new nuclear capacity. **However, procurement should not be engaged prior to the studies above being concluded.**" (emphasis added)

97. The recommendation neatly summarises NERSA's rationale behind imposing the three conditions. In plain terms, NERSA did not know enough about how much nuclear energy costs, how long it would take to procure, and whether nuclear energy would address South Africa's electricity demands post-2030. The Minister had failed to properly motivate and provide a rationale for why South Africa needed and could afford 2 500MW of new nuclear power. NERSA required the Minister to provide that motivation and rationale, before NERSA could independently assess whether it was appropriate for it to agree with the Minister that South Africa should procure 2 500MW of new nuclear power.

(e) *The intervening two years*

98. After NERSA published the RFD, nothing seemed to happen, at least publicly, for two years. Presumably, the Minister of Energy should have been using this two-year period to assess whether his preliminary view that 2 500MW of nuclear power was required and could be afforded, was, in fact, capable of being justified and shown to be rational and necessary (including by undertaking or commissioning the necessary demand analysis required by NERSA for its concurrence).

(f) *NERSA's concurrence and the secret report*

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99. On 12 September 2023, NERSA wrote to the Minister of Energy informing him of NERSA's decision and that he may proceed with his determination. I attach a copy of this letter (**KM13**).

100. The letter reveals the following:

100.1. On 20 July 2023, the Minister of Energy apparently provided NERSA with a "report" addressing NERSA's three suspensive conditions. The Minister did not and has not made this report public.

100.2. On 30 August 2023, NERSA decided that the Minister satisfied the three conditions after considering his report. NERSA did not consult the public *at all* on the Minister's report. NERSA has not made this report public (nor even the report's gist). NERSA has provided no reasons *whatsoever* for its decision.

101. I underscore that NERSA determined the Minister's compliance with NERSA's conditions *two years* after NERSA communicated its partial decision to suspend its concurrence (26 August 2021).

102. On 26 January 2024, the Minister of Electricity "issued", by way of publication in the gazette, the Minister of Energy's determination.

(g) *The PAIA requests*

103. On 13 December 2023, six weeks before the Minister of Electricity "issued" the determination, but after NERSA had already concurred with the

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determination, I applied to the DMRE under PAIA for the record of the decision to procure 2 500MW of nuclear generation capacity (**KM14**).

104. To date, I have not received a response from the DMRE.

105. On 13 February 2024, I appealed under PAIA against the DMRE's deemed refusal of access to the requested records (**KM15**).

106. On 14 February 2024, I submitted another PAIA request to NERSA (**KM16**). I requested *inter alia* the record of NERSA's decision to concur in the Minister's determination and that he had satisfied NERSA's conditions.

107. On 21 February 2024, NERSA replied (**KM17**). NERSA denied my request. Its reasoning:

> *"On receipt of the information in response to a demand placed by the decision, NERSA do not assume ownership of the information. The information remains owned by the Minister.*
>
> *Section 10(2) of the National Energy Regulator Act enjoins NERSA to make available its decision and reasons for decision except information protected by Promotion of Access to Information Act. Section 47 of Promotion of Access to Information Act requires NERSA to seek permission of the owner of the information prior to disclosing it.*
>
> *In the circumstance, NERSA is unable to share the submission made by the Minister in response to the decision by the Energy Regulator."*

108. NERSA never says why the Minister remained the "owner" of the record, whether NERSA sought the Minister's consent for the record's disclosure, and (if so) why the Minister refused consent for disclosure. NERSA's reasoning

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fails to account for NERSA's refusal to disclose *NERSA's* reasons for concurring in the determination.

109. NERSA makes a further allegation in its response to my PAIA request:

> "NERSA took a decision to concur with the Minister on the 2500MW nuclear determination in terms of section 34 but the decision was suspended from implementation pending the submission of the sought information by the Minister.
>
> **Take notice that, the information submitted by the Minister was not to enable NERSA to take a decision on the section 34 determination, as that would have necessitated public consultation.**" (emphasis added)

110. NERSA accepts that if NERSA decided on whether to concur with the Minister's section 34, then NERSA would have needed to consult the public. NERSA accepts that it suspended any decision to concur with the Minister's determination pending further information from the Minister. Then, inexplicably, NERSA alleges that the Minister's information "was not to enable NERSA to take a decision on the section 34 determination". This makes no sense. If NERSA – as in fact occurred:

110.1. suspended a decision to concur with a section 34 determination pending further information, or

110.2. put differently, decided to concur, but subject to suspensive conditions which required the Minister to justify with new information why South Africa in fact required and could afford 2500MW of new nuclear power, and deferred final (unconditional) concurrence until

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NERSA decided that it was satisfied with the Minister's justification for the procurement and decided that the suspensive conditions had been fulfilled,

then that further information from the Minister to justify why 2 500MW of new nuclear power was required *could only* enable NERSA to decide on the section 34 determination.

D. THE GROUNDS OF REVIEW

111. The DA brings this application on the basis of PAJA. The section 34 determination and NERSA's decision to concur in the section 34 determination constitute administrative action. Alternatively, the DA bases its review of the section 34 determination on the principle of legality.

112. The DA submits that there are four grounds for reviewing the section 34 decision.

112.1. First, the determination was made in a procedurally unfair manner (section 6(2)(c) of PAJA; alternatively, procedurally irrationally under the principle of legality)

112.2. Second, the wrong Minister took the decision (section 6(2)(a)(i), (a)(ii), (d), (e)(iv), and (f)(i); and/or the principle of legality).

112.3. Third, the Minister failed to include in the determination (gazetted) the requirement that the procurement must occur through an EPC

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(section 6(2)(a)(i), (b), (e)(i), (e)(iii), (e)(iv), (f)(i) and (f)(ii); and/or the principle of legality).

112.4. Fourth, the Minister failed to provide NERSA with a demand analysis as required by NERSA (section 6(2)(a)(i), (b), (e)(i), (e)(iii), (e)(iv), (f)(i), (f)(ii) and (h); and/or the principle of legality).

(i) Procedural unfairness

113. The section 34 determination, and NERSA's concurrence in the section 34 determination, must have been made in a procedurally fair manner.

114. NERSA was obliged, before deciding to concur with the section 34 determination, to provide the public with proper notice of its decision and a reasonable opportunity to make representations.

115. NERSA afforded the public an opportunity to make representations on 23 November 2020. But NERSA never consulted with the public again before deciding to concur with the Minister on 30 August 2023 (almost three years later).

116. NERSA's decision was procedurally unfair for three reasons.

117. First, NERSA only considered the substance of the Minister's determination *after* suspending its concurrence and *after* receiving the Minister's report.

118. Imagine the following. An administrator has to decide whether to issue a mining licence. The administrator invites the public to comment on a mining

licence application. The public points out that the applicant failed to consider, entirely, the environmental impact of the licence. The administrator, instead of dismissing the application, decides to "suspend" their decision on condition that the applicant addresses the environmental impact of the licence. When the applicant provides the administrator with an environmental impact assessment, the administrator decides to grant the licence—but entirely in secret. The administrator fails to invite the public to comment on the applicant's approach to environmental impact.

119. Obviously, this is unfair. The public had a right to comment on the applicant's environmental impact assessment. The public was entitled to comment on the *substance* of the application, including its environmental impact. The public cannot be deprived of that right only because the applicant failed to address it initially, and because the administrator decided to afford the applicant an opportunity to do so later.

120. This is exactly what happened here.

121. On 26 August 2021, instead of refusing consent, NERSA took a decision to suspend its concurrence (or, put differently, it made its concurrence subject to the fulfilment of a number of substantive conditions). As pointed out in the public comments, NERSA did not have sufficient information from the Minister regarding the cost, timing, and technological variations of nuclear energy. NERSA also did not know whether procuring 2 500MW of nuclear power would address (and if so, to what extent) electricity demand post 2030. NERSA needed to know all this before concurring. These critical factors bear on whether concurrence would promote, *inter alia*, affordable access to

electricity and the interests and needs of present and future electricity customers (as envisaged in section 2 of ERA).

122. Hence, NERSA imposed the three conditions. Instead of refusing to concur, NERSA gave the Minister an opportunity to address these critical aspects of his determination.

123. But when the Minister (finally) addressed these critical issues, NERSA decided to concur in the determination (or, put differently, decided that the Minister's new report had satisfied NERSA that South Africa required and could afford 2 500MW of new nuclear power) without any public input on the Minister's response.

124. This is unfair. Had the Minister provided NERSA with this information up front, the public would have and should have commented on it. But now, only because the Minister failed to provide the information up front, and only because NERSA decided to afford him an opportunity to provide the information later, the public is deprived of their right to comment on *key* aspects of nuclear procurement like cost, timing, and electricity demand.

125. I stress that on 20 July 2023, when the Minister finally presented his reasons (and, presumably, the necessary information) for why NERSA *should* concur, NERSA was not ticking boxes to ensure compliance with formal conditions. NERSA was taking a substantive decision, including deciding whether nuclear energy was cost effective and necessary. NERSA was deciding whether nuclear capacity was a viable option to meet demand post 2030; and it was making that decision in 2023, some two years after the last time that it sought

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any public comment. These are weighty, meaty considerations, and they were considered in the light of substantial new submissions from the Minister made two years after the initial (or partial) decision was taken (and two years since any public consultation had occurred). In the circumstances, NERSA should have consulted the public on these issues, including parties and bodies that it knew had specialised expertise in the field. Its failure to do so was plainly unfair and procedurally irrational.

126. That NERSA was faced with a substantive decision after receiving the Minister's report explains why NERSA only decided to (finally) concur with the Minister on 30 August 2023 (and not before, as NERSA might seek to suggest). It may be that had NERSA imposed entirely formal conditions on its concurrence, then the Minister could have relatively quickly confirmed compliance and NERSA could be taken to have decided to concur in 2021. But where an administrator suspends considering the substance of their decision (however, characterised – whether as a partial decision, as an agreement subject to substantial suspensive conditions, or as a suspended decision), and considers that substance later, then the administrator can only be said to have taken their decision at that later date. Of course, the point is made clear by the chronology above:

126.1. It was only after NERSA had taken its decision to confirm that it was satisfied that the Minister had met the substantive requirements (conditions) and satisfied NERSA that 2 500MW of nuclear power was needed and could be afforded, that NERSA confirmed that the Minister had NERSA approval for the determination to be considered

final and capable of being acted upon (although, for the reasons given above, the determination should have included, in paragraph 5, the EPC procurement restriction).

126.2. This only occurred on 30 August 2023 (two years after NERSA initially considered whether or not to give an unqualified concurrence), and was only conveyed to the Minister of Energy in September 2023.

126.3. Prior to this date, the Minister could not and did not attempt to publish the determination in the gazette. Before that point, NERSA had not finally concurred.

127. To revert to the above example, the administrator only decided to award the mining licence *after* considering the environmental impact, not when the administrator decided to suspend their decision.

128. The point is a simple one. A decision to suspend the substance of one's decision is, by definition, not the same as the decision itself.

129. Otherwise, administrators could "suspend" their decisions all the time, and avoid consulting with the public on the substance of those decisions.

130. This is so regardless of how an administrator characterises a decision to suspend, or defer, its decision. The law is concerned with substance, not form. NERSA suggests that, in 2021, it 'concurred' in the determination but did so subject to the fulfilment of suspensive conditions and the requirement that paragraph 5 of the determination be amended. However, precisely because

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this meant that its 'concurrence' in **2021** was not final (the determination could not be gazetted in **2021** – nor was it), but only partial, its decision to finally (and without suspensive conditions) concur in the determination, and approve its gazetting, was only taken in August **2023**. While these facts are not reflected in the Minister of Electricity's' notice when gazetting the determination, this is why the determination could only be (and was only) gazetted after NERSA had conveyed its final agreement to the Minister in September 2023.

131. Second, the length of time. The Minister took *two years* to revert to NERSA regarding NERSA's conditions. In *Earthlife*, the High Court held that such a delay warrants a fresh concurrence from NERSA, including a fresh public consultation process. NERSA had the opportunity to conduct this fresh process once it received the Minister's report. However, NERSA opted to decide to concur without public input.

132. Third, there have been major changes in the energy landscape since NERSA took its partial decision on 26 August 2021. It is not just that two years passed between NERSA's partial and final decisions, but a great deal occurred in that time that bears on the section 34 determination.

132.1. Both the IRP2019 and NERSA's RFD note the profound impact loadshedding had on electricity demand (by 2019 and 2021 respectively). But in the two years between NERSA's partial and final decisions, there had been a *record* amount of loadshedding. I attach a graph summary as **KM18.** In 2022, there were 205 days of loadshedding (up from 75 in 2021). In 2023, there were a record 335

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days of loadshedding, including an astonishing 44 days of stage six loadshedding (the most before was 8 days of stage six in 2022). Already in 2024, there have been 56 days of loadshedding, almost double the days of loadshedding for the whole of 2019.

132.2. On 1 March 2023, National Treasury introduced a tax rebate for solar panel installation. Along with loadshedding, the rebate contributed to a massive increase in rooftop solar capacity: from 983MW in March 2022 to 4 412MW in June 2023. This is a 349% increase in a little over a year. By the end of January 2024, the private sector and residences had installed 5 400MW of rooftop solar capacity.

132.3. Complementing this boom, in the first quarter of 2023, South Africa imported five times as many batteries as it did in the whole of 2022, as consumers looked for more ways to retain power during outages. Research suggests that the decline in South Africa's coal generation, coupled with the boom in private power supplies, means electricity generated from the private sector is set to exceed output from Eskom by 2025 (**KM19** and **KM20**).

132.4. Bid Windows 5 and 6 of the REIPPPP, Bid Window 1 of Battery Storage, and the Risk Mitigation Independent Power Producer Procurement Programme were concluded. Together, these procurement processes procured around 6 000MW of generation capacity.

132.5. There has been a serious roll-out of procurement of generation at a municipal level. The City of Cape Town, for example, is in the process of procuring 800MW of generation, and a number of smaller towns and municipalities are expediting securing independent power generation to mitigate the effects of loadshedding (for example, Stellenbosch, Riverdale, and Kouga).

132.6. The DMRE has also removed the licensing requirements for the development of power generation by consumers (embedded generation) to enable and attract more investment necessary to address loadshedding. The result is an additional potential generation capacity of over 6 000MW.

133. All these developments have direct impacts on the section 34 determination. A fresh consultation process would have allowed for a consideration of these changes.

134. Accordingly, NERSA should have consulted with the public before it decided to concur with the Minister's section 34 determination on 30 August 2023.

135. Even if NERSA's decision did not need to be procedurally fair, which I deny, then it still needed to be rational. For the same three reasons, NERSA's failure to consult the public rendered its decision procedurally irrational. As the High Court held in *Earthlife*, rationality required NERSA to consult "sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power" (para 50).

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(ii) The wrong Minister

136. On 6 March 2023, the President created the office of the Minister of Electricity.

137. On 26 May 2023, the Minister of Electricity was assigned the powers under section 34 of the ERA.

138. From that point on, the Minister of Electricity was the only official who had powers under section 34. The beginning or continuation of a section 34 determination process had to be conducted between NERSA and ***the Minister of Electricity*** (statutorily mandated decision-makers under section 34) to reach consensus on a final section 34 determination that could be gazetted.

139. Nonetheless, the Minister of Energy continued to exercise those powers.

139.1. On 20 July 2023, he submitted his report supposedly addressing NERSA's conditions for concurrence under section 34. Moreover, it was plainly the Minister of Energy who oversaw the finalisation and approval of that report between 26 May 2023 and 20 July 2023, despite having no power to do so.

139.2. On 30 August 2023, NERSA concurred with the Minister of Energy's section 34 determination (and indicated that the Minister of Energy had satisfied NERSA that its substantive conditions had been met), even though at the time the Minister of Energy had no authority to make a section 34 determination.

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139.3. On 26 January 2024, the Minister of Electricity "issued" the Minister of Energy's determination, even though at the time the Minister of Energy could not make a section 34 determination.

140. The section 34 determination is unlawful for this reason alone. The Minister of Energy, who made the determination, could not do so at the time of its promulgation.

141. The Minister of Electricity appears to have foreseen this obvious problem. In an attempt to circumvent it, he alleges the following as a preamble to the promulgation of the section 34 determination:

> "1. WHEREAS I was appointed Minister of Electricity on 6 March 2023 and the administration of powers and functions under Section 34(1) and (2) of Act No.4 of 2006 was transferred to me under Proclamation 121 of 2023 published in Government Gazette No.48662 of 26 May 2023;
>
> 2. AND WHEREAS the Minister of Mineral Resources and Energy had already submitted the Determination for concurrence to the National Energy Regulator of South Africa (NERSA) under Section 34(1) of Act No.4 of 2006 regarding a process to procure a new Nuclear Energy generation capacity through a draft Government Notice;
>
> 3. AND WHEREAS NERSA gave its concurrence on the Determination on 3 September 2021;
>
> 4. NOW THEREFORE, in terms of Section 34(1) of Act 4 of 2006, I hereby issue the said determination as attached herein."

142. The Minister of Electricity suggests that the Minister of Energy "had already" submitted his section 34 determination, and NERSA had given its concurrence

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on 3 September 2021. So, it was out of his hands. All he could do was publish the Minister of Energy's determination.

143. This reasoning rests on a legally and factually mistaken premise. NERSA did not give its concurrence on 3 September 2021 or on 26 August 2021. The reference to 3 September 2021 seems to be taken from the date when NERSA appears to have appended its signature to the determination (which presumably it decided, for some reason, to do after it made its suspended or partial decision of 26 August 2021). But, as explained previously, NERSA did not make any final decision on 26 August 2021 or any time before 30 August **2023**. Its signature (if accurately reflected in the gazetted determination), was plainly a signature subject to substantive conditions. NERSA only took an initial (or partial) decision on 26 August 2021. Plainly, as the Minister of Energy well knew, and the Minister of Electricity ought to have been advised, NERSA's signature was subject to the stricture of that partial decision (as recorded in the RFD (KM13) and the 3 September 2021 media statement (KM12)). As I explained above, NERSA effectively took a decision to suspend taking a decision. It made no final section 34 concurrence decision. It took a preliminary decision making its concurrence conditional on the Minister of Energy satisfying it that South Africa required and could afford 2500 MW of new nuclear power. NERSA took its final decision to concur with the determination only on 30 August 2023, determining – only after considering the Minister of Energy's report of July 2023 – that South Africa required and could afford 2500 MW of new nuclear power.

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144. Yet none of this was recorded by the Minister of Electricity in the gazetted notice publishing the determination.

145. The Minister of Electricity thus acted under a material mistake of fact or a material mistake of law. He assumed that he had no jurisdiction to consider the section 34 determination, because it had already been finally decided in 2021. But this was a mistake. NERSA had not taken its final decision to concur in the section 34 determination before 26 May 2023 (when the Minister of Electricity took over).

146. It may have made a substantial difference had the Minister of Electricity properly understood his powers. He could have commented on NERSA's conditions, providing more or better evidence to NERSA, and even taken a different view on the section 34 determination to the Minister of Energy. That there are different approaches to energy policy within cabinet is no secret. The Minister of Energy, for example, has made his antipathy towards the President's efforts to procure renewable energy well known (**KM21** and **KM22**).

147. Moreover, plainly, the determination was ultra vires and in violation of section 34:

147.1. the gazetted determination was taken and finalised by the Minister of Energy through interaction with NERSA pursuant to section 34 between July and September 2023;

147.2. but at this time, the Minister of Energy had no power under (or role pursuant to) section 34, and no power or right to interact with NERSA to obtain its final approval under section 34; and

147.3. the Minister who was empowered to reach agreement with NERSA on finalising of the section 34 determination, was the Minister of Electricity;

147.4. but the Minister of Electricity took no part in the process.

(iii) The EPC procurement restriction

148. NERSA consented to the Minister's determination subject to the requirement that paragraph 5 of the determination be amended to provide that any procurement of nuclear energy generation capacity occurs through an EPC (the EPC procurement restriction).

149. The determination, as gazetted, does not include EPC procurement restriction.

150. In other words, the determination that was gazetted, and therefore is binding (including on the procurer (DMRE)) unless and until it is set aside, does not include the EPC procurement restriction. It is fatally flawed for this reason alone.

151. Therefore, the determination (as gazetted) is unlawful. The determination cannot omit a material change that NERSA required to be made when giving

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its concurrence; otherwise, the determination would be without NERSA's consent and invalid.

(iv) No demand analysis

152. The DA has been forced to bring this application in the dark. Despite the PAIA request by the DA and the obligation on NERSA under section 10(2) of NERA, the Minister of Energy and NERSA have refused to provide to the public the Minister's report to NERSA on NERSA's conditions and NERSA has refused to provide any reasons for its final decision.

153. So, the DA does not know whether the Minister complied with NERSA's conditions, and why NERSA thought the Minister complied with those conditions.

154. However, the only implication of NERSA's and the DMRE's refusal to disclose the Minister's report is that it is likely that this has been done to shield the process from scrutiny since, among other things, the Minister failed to provide the demand analysis required by NERSA.

155. So, had the report included a demand analysis, then the DMRE and NERSA would have and should have disclosed that analysis. However, the DMRE and NERSA did not disclose the analysis. Therefore, it is reasonable to assume that there was no demand analysis.

156. The DA will reconsider this ground of review once it has been furnished with the rule 53 records from the Minister of Energy, the Minister of Electricity, and NERSA.

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(v) Conclusion on the grounds of review

157. The section 34 determination was not procedurally fair (or procedurally irrational), taken by the wrong minister, failed to include NERSA's EPC procurement restriction, and taken without a demand analysis.

158. There may be further grounds for reviewing the section 34 determination once the DA receives the rule 53 records from the Minister of Energy, the Minister of Electricity, and NERSA. It may well be that the Minister of Energy's "report" to NERSA could have provided no rational basis for NERSA's concurrence.

E. REMEDY AND COSTS

159. The DA seeks an order declaring as invalid and setting aside the section 34 determination. Each of the DA's grounds of review suffice to declare the determination invalid. There is no reason why the default remedy of setting aside should not follow from a declaration of invalidity.

160. The DA further seeks an order declaring any **RFP** issued pursuant to the section 34 determination as invalid and setting aside that RFP. The High Court *Earthlife* granted a similar award. If the section 34 determination is bad in law, then so too are any subsequent steps to procure 2 500MW of nuclear energy.

161. The DA will only seek costs against a respondent that opposes this application, including the costs of three counsel.

F. THE NEED FOR AN EXPEDITED HEARING

162. As indicated above, the section 34 determination was only gazetted at the end of January 2024.

163. Before this, the government respondents could not proceed with the procurement of new nuclear generation capacity.

164. However, the Minister has indicated that an RFP for the procurement of 2500 MW of nuclear energy pursuant to the determination, which will begin the procurement process, will be issued in March 2024 (**KM23** and **KM24).**

165. At the time of deposing to this affidavit, no RFP had been issued, and it is not known how long any such procurement process might take once the RFP is issued.

166. It is hoped that in light of this application – which demonstrates, beyond question, that the section 34 determination must be set aside – the government respondents will choose not to issue any RFP for new nuclear procurement (based on the section 34 determination) until this matter is determined.

167. That approach is not only prudent but also in keeping with the rule of law and the government respondents' constitutional duty to respect this Court and ensure its effectiveness.

168. Nevertheless, even if the Minister adopts this approach, evidently, it is in the interests of all concerned, the public, and the country that this application be determined as expeditiously as possible.

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169. It is constitutionally necessary – if new nuclear procurement is to be proceeded with – for there first to be a new lawful and procedurally fair section 34 determination, which properly determines the true extent, if any, of the country's need for and ability to afford new nuclear energy, after ensuring a proper opportunity for public consultation.

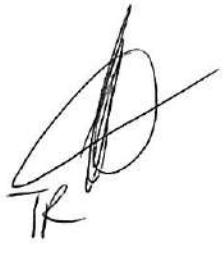
170. That can only occur once this application is determined. It is thus essential for this matter to be determined expeditiously.

171. If the government respondents choose to proceed with issuing the RFP and the procurement process pursuant thereto, despite the launching of this application, then obviously, they do so at significant risk that the entire process will have to be set aside if and when the section 34 determination is set aside.

172. It is hoped that this approach will not be taken by the government respondents. It would not be in keeping with the government respondents' constitutional obligations. But even if they do take this approach, this would once again underline the need for this matter to be determined expeditiously, so that the section 34 determination and the RFP could be set aside prior to any final award of the nuclear procurement contract being made.

173. For this reason, it is appropriate and necessary for the Deputy Judge President:

173.1. to set an expedited hearing date for the determination of this matter, and



173.2. to case manage the matter from the outset, to ensure that all times frames for filing papers are strictly adhered to, and that time-frames for filing further papers (including heads of argument), are determined with reference to the expedited hearing date.

174. After launching this application, the DA's attorneys will write to the Deputy Judge President to request a meeting in chambers with all the parties' legal representatives so that an expedited date can be allocated and the matter can be case managed.

KEVIN MILEHAM

I certify that on the 7th day of March 2024 and at Bellville the above deponent appeared before me and that he acknowledged to me that he knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn to in my presence in accordance with the requirements of Regulation No. R1428 dated 16 November 1984, as amended, which have been fulfilled.

COMMISSIONER OF OATHS

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